specious, in that the journey is broken and in fact there is a separate trip each way. Here again there is real danger of controversy between the states. The case of a pass is more troublesome. There is undoubtedly a difference in degree between regulating the rate of charges on commerce from the other shore and in saying that a person shall not come into the state on a public service corporation *gratis* when others are required to pay.[25] But in both cases the power invoked by the state will affect only indirectly its morals, peace, and welfare, while there is the same danger of conflict with the other state. The test of the necessity for uniformity is the danger of irreconcilable regulation according to the diverse and discriminatory interests of the states involved.

It is submitted that this is the attitude of the Supreme Court.[26] The apparent diversity in the decisions is due to some extent to the practical manner in which it has been applied. Where there is actual danger of serious conflict, the exercise of the power by the state would be inexpedient and an unreasonable burden upon commerce. But where controversy is merely a possibility, the exercise of the power by the state within its jurisdiction is legitimate. It is to be hoped that the West Virginia case will be taken to the Supreme Court, as its decision would do much to point out the correct *criteria* of the extent of a state's power over interstate commerce.

ELIGIBILITY OF WOMEN FOR PUBLIC OFFICE. — While many courts in the last half-century have expressed opinions that women are ineligible for office at common law, the great majority of the cases directly involve only the construction of a statute or constitution. In Great Britain, the question has been whether an act fixing the qualifications for a certain office is to be construed as giving women the right to hold it; in America, most of the cases turn upon whether there is a broad constitutional inhibition. While the question of common-law eligibility can enter in each type of case, courts in both countries have confused considerations of interpretation and construction with a problem of substantive law.

The constitutions of a not inconsiderable number of states do not expressly confine the right to hold office to electors, and have not been amended to give women the vote. In such states, when a woman claims her election or appointment to office is valid, the first question must be whether, apart from common-law eligibility, there is an implied restric-

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treated as a succession of round-trip tickets. The power of a state to limit the charge for a round-trip ticket was recognized as valid in Missouri *v.* Sickmann, 65 Mo. App. 499 (1896).

[25] "Its only effect is equalization by apposite proscription against discrimination in the various forms of commercial exchange of commodities and intercourse between the states." Schrader *v.* Steubenville, etc. Co., *supra*, p. 212. But suppose one state stipulates in the franchise of the corporation that its public employees shall be permitted to use the bridge free of charge and the other state commands the corporation to allow no one to pass free.

[26] See Covington Bridge Co. *v.* Kentucky, *supra*, pp. 220–221; Port Richmond Ferry *v.* Hudson County, *supra*, pp. 330–333. See also Broadway & Newport Bridge Co. *v.* Commonwealth, 173 Ky. 165, 172, 190 S. W. 715, 718 (1917).

tion in the constitution making the right to hold office co-extensive with the right to vote. It is asserted that the one right necessarily depends upon the other;[1] there is, however, this distinction: the vote is a power of sovereignty; the office, the means whereby the power operates. It is a *non sequitur* that, in limiting the classes of voters, the constitution is necessarily limiting the classes of officeholders through whom the voters may make their wishes effective. Several cases have pointed out that the restriction upon those who can hold office would be a restriction upon the freedom of choice of the voters, and have repudiated any such implied limitation upon the exercise of the voters' will.[2] The rule is also repudiated, although not in words, where the same court holds that the restriction does not extend to offices created by the legislature, as distinguished from those created by the constitution,[3] but that the legislature, in creating offices, cannot make the franchise for the new positions any broader than it was for the old ones;[4] for the result is that voters are allowed to elect non-voters. Even this attitude, so far as it imposes the qualification upon any officeholders, seems incorrect.[5]

Whether, if there is a common-law ineligibility, it is incorporated in the constitution, is a quite different question. A clause giving the right to elect to office must be read in the light of what such a privilege meant at common law, just as a clause that no one shall answer to a criminal charge unless indicted must be read in the light of the common-law rule that a grand jury cannot indict unless twelve jurors so vote.[6] This would seem clear, but it is not so clear that such ineligibility could only be removed by a constitutional amendment. It could be argued, on the one hand, that, although implied, a restriction upon those who can take part in governmental functions is as much a part of the constitution as any express enactment;[7] on the other, that, while the constitution must be interpreted under the common law, it does not enact the common law of its time, and that the common-law rule of ineligibility can be changed.[8] Taking this second view, it might be maintained that the law on this point can and should adapt itself to altered circumstances without waiting for legislative enactment; that courts which can declare

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[1] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 894, note 1; MECHEM, PUBLIC OFFICES AND OFFICERS, § 67.

[2] Wright v. Noell, 16 Kan. 601 (1876); Steusoff v. State, 80 Tex. 428, 15 S. W. 1100 (1891); Opinion of the Justices, 62 Fla. 1, 57 So. 351 (1912); and see Barker *v.* The People, 3 Cow. (N. Y.) 686, 703 (1824); People *v.* McCormick, 261 Ill. 413, 419, 103 N. E. 1053, 1056 (1914). *Contra*, State *v.* Smith, 14 Wis. 497 (1861); State *v.* McMillen, 23 Neb. 385, 36 N. W. 587 (1888); Attorney General *v.* Abbott, 121 Mich. 540, 80 N. W. 372 (1899); State *v.* Hodges, 107 Ark. 272, 154 S. W. 506 (1913); State *v.* Knight, 169 N. C. 333, 85 S. E. 418 (1915).

[3] Huff *v.* Cook, 44 Iowa, 639 (1876).

[4] See Coggeshall *v.* City of Des Moines, 138 Iowa, 730, 736, 117 N. W. 309, 311 (1908); *In re* Carragher, 149 Iowa, 225, 227, 128 N. W. 352, 353 (1910).

[5] "It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications as necessary for office, it meant to exclude all others as prerequisites." 1 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., § 625.

[6] State *v.* Barker, 107 N. C. 913, 12 S. E. 115 (1890).

[7] See Arthur W. Machen, Jr., "The Elasticity of the Constitution," 14 HARV. L. REV. 200, 273; 24 HARV. L. REV. 139.

[8] Schuchardt *v.* The People, 99 Ill. 501 (1881).

a newspaper syndicate a public utility[9] and can hold a trust to promote atheism not against public policy[10] should be able to hold that the modern woman has intelligence and discretion enough to hold public office. The analogies are not strictly in point, for this question would involve, not the determination of whether a new fact fits an old conception, but a change of status. It could, however, be said that statutes have gone so far in removing women's legal incapacity that the courts do not have to effect a change of status but merely to accept it.[11] It is significant, in this aspect of the problem, that Lord Ronan has declared in a dictum in the recent case of *Frost* v. *The King*[12] that, whatever may have been the previous law, women can no longer be held ineligible for office.

That there was a general common-law ineligibility is by no means certain. Cases which hold that there was usually assume that such an ineligibility must have existed, and then treat the numerous early cases where women's rights to hold offices have been upheld as exceptions to the rule assumed. An English case usually cited by the courts as holding that there is an ineligibility at common law in reality holds no more than that the framers of an act giving the right to hold a certain office did not mean to open it to women;[13] dicta to the effect that women are ineligible at common law are based upon a preceding case, which only decided they could not vote at common law,[14] a question which may involve quite different considerations.[15] There are many early cases holding that women can fill offices whose functions can be performed by deputy,[16] which would seem to show that the law did not regard women as incapable of the necessary discretion, for of course the deputy is subject to the officeholder's control. The consideration of feminine sensitiveness does not seem to have kept women out of the positions of prison-keeper[17] and commissioner of sewers.[18] Most of the cases concern women's eligibility to administrative offices, and it is generally said, even by courts which hold that there is no ineligibility here, that the eligibility does not extend to judicial and legislative offices. Certainly the capacities required by the three classes of office differ; in each, common-law eligibility depends upon custom, and, as there is considerably less evidence of women holding offices of the last two classes,[19] the distinction will probably be maintained. As for administrative offices, the tendency of recent years has been to hold women eligible. Some of the cases have been concerned with offices purely ministerial,[20] but some

[9] The Interocean Publishing Co. *v.* The Associated Press, 184 Ill. 438, 56 N. E. 822 (1900).

[10] Bowman *v.* Secular Society, Limited, [1917] A. C. 406.

[11] Ward *v.* Berkshire Life Insurance Co., 108 Ind. 301, 9 N. E. 361 (1886).

[12] [1919] 1 I. R. 81, 106.

[13] Beresford-Hope *v.* Lady Sandhurst, L. R. 23 Q. B. D. 79 (1889).

[14] Chorlton *v.* Lings, L. R. 4 C. P. 374 (1868).

[15] See *supra*.

[16] See 38 L. R. A. 208, note.

[17] Rex *v.* Lady Braughton, 3 Keb. 32 (1672).

[18] See CALLIS ON SEWERS, 4 ed., 296, 299.

[19] But see 24 HARV. L. REV. 139, notes 7 and 8; 38 L. R. A. 208, note.

[20] Gilliland *v.* Whittle, 33 Okla. 708, 127 Pac. 698 (1912). Here it was held that, under the wording of the state constitution, a woman could be clerk of court. State *v.* De Armijo, 18 N. M. 646, 140 Pac. 1123 (1914) (state librarian).

have gone much further.[21] England[22] and Quebec[23] have recently held that, at common law, women cannot be attorneys, but these cases involve only the custom in a particular profession. In both England and America, should the question of common-law eligibility arise again before the matter is finally settled by statute, the dicta and discussion in *Frost* v. *The King*[24] may lead the court to decide in favor of eligibility.

LEGAL STATUS OF VOLUNTARY ASSOCIATIONS.[1] — In the absence of a statute, it is clear that a voluntary or unincorporated association cannot sue or be sued in the name of the association.[2] But statutes in many jurisdictions allow actions by, or against, such organizations in their ordinary name, or in the name of some officer.[3] The famous case of the *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*[4] held that an Act of Parliament[5] which gave unincorporated trade unions a right to hold property for their own use and provided for a registry of their names, by implication made the unions liable to suits against them in such registered name. For the purposes of that case, it is submitted, it would have made no great difference whether the association were regarded as a legal entity distinct from its members, or whether the trade union's name were considered merely as an authorized compendious designation, by way of procedure, for all or for certain representative members of the union. The House of Lords did adopt the view that the union was a legal entity, and this seems a proper and desirable result. But since the suit was for an injunction only, the suggestion of Lord Macnaghten[6] and of Lord Lindley,[7] that a representative action,

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[21] State *v.* Quible, 86 Neb. 417, 125 N. W. 619 (1910) (county treasurer); Opinion of the Justices, *supra* (county treasurer).

[22] Bebb *v.* Law Society, L. R. [1914] 1 Ch. D. 286.

[23] Langstaff *v.* Bar of Province of Quebec, 25 Que. K. B. 11 (1915). The American authorities are divided.

[24] *Supra.*

[1] For a discussion of the general problem of the jurisdiction of courts over a controversy between a voluntary association and a member, see Universal Lodge No. 14, F. & A. M. *v.* Valentine, 107 Atl. 531 (Md. 1919).

[2] Francis *v.* Perry, 82 Misc. 271, 144 N. Y. Supp. 167 (1913). See Allis-Chalmers Co. *v.* Iron Moulders' Union, 150 Fed. 155, 183 (1906); New England States Sangerbund *v.* Fidelia Musical & Educational Society, 218 Mass. 174, 105 N. E. 629 (1914).

[3] Francis *v.* Perry, *supra;* Court Harmony, A. O. F. *v.* Court Abraham Lincoln, A. O. F., 70 Conn. 634, 40 Atl. 606 (1898). Colorado, Michigan, Minnesota, New Jersey, Pennsylvania, and a number of other states have similar statutes. In some cases they are limited to fraternal benefit societies paying more than a minimum death benefit, as in West Virginia. See CODE 1913, c. 55 A, §§ 3226–3263. In Minnesota, the statute has been held to apply only to business partnerships and only to parties defendant. St. Paul Typothetæ *v.* St. Paul Bookbinders' Union, 94 Minn. 351, 102 N. W. 725 (1905). Other modifications are found in the interpretations of the Ohio and the Nebraska statutes.

[4] [1901] A. C. 426. See 15 HARV. L. REV. 311.

[5] TRADE UNION ACT 1871, 34 & 35 VICT. c. 31, as amended by ACT OF 1876, 39 & 40 VICT. c. 22.

[6] See page 438 of report. See also Pickett *v.* Walsh, 192 Mass. 572, 589, 78 N. E. 753, 760 (1906); American Steel & Wire Co. *v.* Wire Drawers' & Die Cutters' Unions, 90 Fed. 598, 605 (1898). See POMEROY, CODE REMEDIES, 4 ed., 267.

[7] See page 443 of report.